

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

PATRICK HENRY MURPHY, JR., . 4:19-CV-01106  
 . HOUSTON, TEXAS  
 PLAINTIFF, . APRIL 18, 2019  
 VS. . 2:00 P.M.  
 .  
 TDCJ EXECUTIVE DIRECTOR .  
 BRYAN COLLIER, ET AL, .  
 .  
 DEFENDANTS. .  
 .....

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE  
BEFORE THE HONORABLE SIM LAKE  
UNITED STATES DISTRICT JUDGE

***APPEARANCES***

FOR THE PLAINTIFF:

Jeffrey R. Newberry  
UNIVERSITY OF HOUSTON LAW CENTER  
4604 Calhoun Road  
Houston, Texas 77204-6060

FOR THE DEFENDANTS:

Leah Jean O'Leary  
Amy H. Prasad  
Matthew D. Ottoway  
OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
Post Office Box 12548  
Austin, Texas 78711

*APPEARANCES - CONTINUED*

OFFICIAL COURT REPORTER:

Mayra Malone, CSR, RMR, CRR  
U.S. Courthouse  
515 Rusk  
Room 8004  
Houston, Texas 77002  
713-250-5787

Proceedings recorded by mechanical stenography. Transcript  
produced by computer-aided transcription.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

*PROCEEDINGS*

THE COURT: We are here this afternoon for the scheduling conference in Civil Action H-19-1106, Patrick Henry Murphy, Jr., versus the Texas Department of Criminal Justice and Bryan Collier.

Beginning with plaintiff's counsel, will counsel please identify themselves for the Court?

MR. NEWBERRY: I'm Jeff Newberry for Patrick Henry Murphy.

MS. O'LEARY: Your Honor, I'm Leah O'Leary for the defendant, and I also have Amy Prasad and Matt Ottoway. We are from the Attorney General's office.

THE COURT: Thank you. I assume everybody has read the first amended complaint. I have a question about a statement that appears in page 13. So turn to that page, please.

The second line says, "Attorney visits and visits with approved ministers and spiritual advisors can only happen between 3:00 and 4:00 p.m. There is no such restriction on visits with the TDCJ chaplain, who appears to have access to an inmate until the minute he enters the execution chamber. See Exhibit 1. Because TDCJ employs only Christian and Muslim clerics as chaplains, this policy favors Christian and Muslim inmates."

First of all, let me ask plaintiff's counsel,

14:01 1 where is the reference on page 8 to that? Is it paragraph 5C?  
2 Is that correct?

3 MR. NEWBERRY: Yes, Judge Lake. 5C is correct.

4 THE COURT: And there is language on paragraph 3-12,  
14:02 5 the previous page, "The offender may have visits with a TDCJ  
6 chaplain or a minister/spiritual advisor who has the  
7 appropriate credentials and his attorneys on the day of  
8 execution."

9 Let me ask defense counsel, is this a correct  
14:02 10 statement on page 13? In other words, can an inmate -- can a  
11 TDCJ chaplain visit with the inmate after 4:00 p.m.? I guess  
12 that's the precise question.

13 MS. O'LEARY: Your Honor, our understanding is that  
14 the chaplain visits, including with TDCJ chaplains, happen  
14:02 15 between 3:00 and 4:00. From 4:00 until the time of the  
16 execution, other procedures are happening, such as the policy  
17 talks about. There are showers. There is a meal, things like  
18 that. And so certainly I'm not prepared to point you to  
19 evidence yet, but that's our understanding. And that is  
14:03 20 certainly something --

21 THE COURT: Where do you get the idea that there is no  
22 restriction by TDCJ chaplains after 4:00 p.m.?

23 MR. NEWBERRY: Judge Lake, I believe if there was that  
24 restriction, it would be expressed in paragraph 5C. Let me  
14:03 25 point out, "a minister/spiritual advisor and attorney visits."

1 And I don't think that they would combine TDCJ chaplain and  
2 minister/spiritual advisor to the same category when they were  
3 careful on the previous page, 3-12, to list those as three  
4 separate categories. But it is just the absence of the TDCJ  
5 language in 5C that they were basing that on.

6 MS. O'LEARY: Your Honor, I will also point you to the  
7 exception in that same provision that says the warden can grant  
8 exceptions to the 4:00 restriction. And we are not aware of  
9 any requests by Mr. Murphy for an exception, which is permitted  
10 under that policy.

11 THE COURT: The second question is: It talks about  
12 TDCJ chaplains and a minister/spiritual advisor has the  
13 appropriate credentials. That implies that spiritual advisors,  
14 such as the one requested by Mr. Murphy, could be approved for  
15 visits at the same time as the TDCJ chaplain, if they had the  
16 appropriate credentials. So is that correct?

17 MS. O'LEARY: That is correct, Your Honor. And  
18 credentials just refers to they have gone through the steps to  
19 be approved to enter onto the unit and things like that.

20 THE COURT: So what Mr. Murphy has identified as  
21 spiritual advisor who he wanted to be present with him, could  
22 that person apply and receive credentials to be with  
23 Mr. Murphy?

24 MS. O'LEARY: Not inside the execution chamber.

25 THE COURT: I understand that. Under the current

1 policy, nobody can be in the execution chamber. I'm dealing  
2 with the equal protection claim now. Could that person apply  
3 for credentials?

4 MS. O'LEARY: Yes. And my understanding, based on the  
5 pleadings, is that Mr. Murphy's spiritual advisor already has  
6 the credentials to enter the unit and has been visiting with  
7 Mr. Murphy on the prison facility.

8 THE COURT: Well, why wasn't he allowed in the  
9 execution chamber on the date of Mr. Murphy's scheduled  
10 execution constitution?

11 MS. O'LEARY: Well, of course, the execution was  
12 stayed, so we didn't check that far. But the request was  
13 denied because the current policy at that time said that only  
14 TDCJ employees are allowed in the execution chamber. And  
15 that's because the credentials just to visit an offender on a  
16 prison facility are not as sensitive and probably not as deeply  
17 investigated as someone who is actually standing in reaching  
18 proximity to someone who is being executed in the same room.  
19 So just because a spiritual advisor has been approved to enter  
20 onto a TDCJ facility to meet with an offender, that is not the  
21 same as a limitation that only TDCJ employees can be in the  
22 execution chamber.

23 THE COURT: So with respect to the equal protection  
24 argument, if Mr. Murphy's spirit advisor could be credentialed  
25 to have the same access to Mr. Murphy that any other approved

1 chaplain would have, why do you still have an equal protection  
2 claim?

3 MR. NEWBERRY: Because absent evidence pointing --  
4 proving differently, I believe that the TDCJ chaplain does have  
5 more access than a minister/spiritual advisor with approved  
6 credentials.

7 And it is correct that Reverend Shih's  
8 credentials have been approved. I believe he was allowed to  
9 visit Mr. Murphy during this 3:00 to 4:00 window, but his visit  
10 had to end there. And absent evidence to the contrary, I  
11 believe even under the current policy, a TDCJ chaplain, which  
12 would only be a Christian chaplain or a Muslim chaplain, could  
13 have access beyond that.

14 THE COURT: Well, if what the state tells me the  
15 policy provides, then I don't see that you have an equal  
16 protection argument, but we will have to just see what the  
17 discovery reflects on that.

18 The question about being in the chamber, the  
19 execution chamber rises to a different level, because the  
20 state -- even in Justice Kavanaugh's concurring opinion, he  
21 said, "A state may choose a remedy which would allow religious  
22 advisors only in the waiting room, and not the execution room,  
23 because there are operational and security issues associated  
24 with execution by lethal injection."

25 If you have constitutional and statutory claims

14:07 1 dealing with Mr. Murphy's desire to have his advisor in the  
2 room to assist him in praying at the time of his execution,  
3 that's an issue that will have to be addressed under the  
4 merits. You have got two claims. You have got equal  
14:08 5 protection, which you will have to prove satisfies my concerns  
6 about that, and you have got this other claim.

7 When the state revised its policies, did you  
8 check to see what other states allowed with respect to the  
9 access by spiritual advisors into the execution chamber?

14:08 10 MS. O'LEARY: I know that there is a consideration of  
11 what Alabama does in their state, but I'm not aware of a  
12 further study of what other states do.

13 THE COURT: Are you aware of any law that says under  
14 the First Amendment, or under the statute, an inmate has a  
14:08 15 right to have a spiritual advisor in the execution chamber  
16 immediately preceding his execution?

17 MR. NEWBERRY: I'm not aware of a law, a First  
18 Amendment provision or a statute that says expressly that;  
19 however, especially the statute, the Religious Land Use and  
14:09 20 Institutionalized Persons Act, if it is something that is  
21 important to his religion, a sincerely held belief, there has  
22 to be a compelling reason to stop him from engaging in that.

23 THE COURT: Well, Justice Kavanaugh appears to  
24 foreshadow the Court's opinion that there might be a compelling  
14:09 25 reason.

1 All right. I have some questions about the  
2 proposed discovery plan that you submitted.

3 You refer in paragraph 2 to two cases. 18A985 is  
4 the Supreme Court's denial of stay. Is that case still  
5 pending?

6 MR. NEWBERRY: It is. They granted the stay. It was  
7 pending the timely filed consideration and disposition of a  
8 cert petition. Our petition for certiorari is currently due  
9 June 25. We don't anticipate asking for any extension, but it  
10 is --

11 THE COURT: What are you going to seek cert from?

12 MR. NEWBERRY: The Fifth Circuit opinion.

13 THE COURT: They granted the stay. Isn't that moot?

14 MR. NEWBERRY: No, Judge Lake, it's not. Because the  
15 stay was pending the filing, consideration and disposition of a  
16 cert petition.

17 THE COURT: It seems to me it will be moot, but we  
18 will worry about that later.

19 What about 18-8615, where is that case pending?

20 MR. NEWBERRY: That is also the Supreme Court. It's a  
21 petition for writ of prohibition that we filed at the same  
22 time. That's scheduled to be conferenced on the 26th, I  
23 believe. That exact -- if I'm missing that date, it's in our  
24 first amended complaint, but I believe it is April 26th at that  
25 scheduling conference.

1 THE COURT: Okay. Do you intend to amend or add any  
2 additional parties? You have got a very short proposed  
3 schedule. If I have to bring in new parties or allow  
4 amendments, that could delay further discovery.

5 MR. NEWBERRY: We do not anticipate adding -- we have  
6 no plans to add additional parties, and the only reason we  
7 needed to do this amendment today was to adjust to the new  
8 policy. We have no plans --

9 THE COURT: Then under Court's schedule, there will be  
10 none without prior approval of the Court.

11 Now, you indicate as to the schedule that you can  
12 complete discovery by June 28th. That's 70 days from today.  
13 And you anticipate sending out at least interrogatories.

14 I have a question to plaintiff's counsel about  
15 page 5, subparagraph D: Depending on the answers he receives  
16 from the interrogatories, the plaintiff anticipates he may send  
17 interrogatories to Collier, Davis, Lewis, et cetera.

18 You mean take depositions or do you just mean  
19 further interrogatories?

20 MR. NEWBERRY: Judge Lake, it depends on the answers  
21 to interrogatories. I think it is very likely that our further  
22 questions could be satisfied with further interrogatories.

23 THE COURT: Because you understand I'm talking  
24 about -- 70 days doesn't allow much time.

25 MR. NEWBERRY: Yes, Judge Lake.

1 THE COURT: All right. Does the state have a problem  
2 with 70 days for discovery?

3 MS. O'LEARY: Your Honor, we are willing to put in the  
4 resources to expedite this scheduling order. However, if I  
5 may, I would like to raise one issue. I think that it would be  
6 beneficial for us to resolve the issue of exhaustion before we  
7 dive into all of this discovery.

8 THE COURT: No. We are not going to do that. We are  
9 going to move forward.

10 MS. O'LEARY: Okay.

11 THE COURT: We are going to move forward. There will  
12 be no 12(b)(6) motions. There will be a summary judgment  
13 motion by each side, a Rule 56 motion. We are going to move  
14 this case through as quickly as we can, given the interests  
15 involved. We are not going to have a threshold exhaustion  
16 argument.

17 Do you anticipate an expert witness? You say no.

18 MR. NEWBERRY: That's correct. We don't anticipate --

19 THE COURT: There will be no experts.

20 The discovery cutoff will be June 28th.  
21 Dispositive motions will be due July 19th. Each side is  
22 limited to one dispositive motion, not to exceed 25 pages of  
23 argument.

24 Now, I have some other questions. Are there any  
25 objections other than what the state has already mentioned as

1 to the schedule?

2 MR. NEWBERRY: We have no objections.

3 MS. O'LEARY: No, Your Honor.

4 THE COURT: All right. I have a question for the  
5 state. We have already talked about the equal protection  
6 issue. You have avoided the First Amendment and statutory  
7 claims with a policy -- this is a suggested policy.

8 What about a policy that allows an inmate who is  
9 scheduled for execution to advise the state no later than 30  
10 days before his scheduled execution whether he wishes a  
11 spiritual advisor to be with him in the execution chamber? And  
12 if so, to identify either the preferred advisor or the religion  
13 of the advisor whom he wishes?

14 The state probably has already approved Christian  
15 and Muslim chaplains, and the state could also approve other  
16 advisors from major religions, such as Buddhism, and could  
17 approve advisors' requests 30 days before the execution, which  
18 would moot this issue. And this would avoid any last-minute  
19 requests. And if the plaintiff's request for a spiritual  
20 advisor raised legitimate security concerns -- for example,  
21 five years ago, if the plaintiff had requested Osama Bin Ladin  
22 as his advisor, or some person who appeared beyond the pale of  
23 a legitimate religious advisor, the state could probably deny  
24 the request. But if the request appeared to be valid, you  
25 could grant the request, allow the advisor to be in the chamber

1 and moot this case.

2 What about that?

3 MS. O'LEARY: Respectfully, Your Honor, the state is  
4 taking the position that allowing non-TDCJ employees in the  
5 execution chamber would severely compromise the security of the  
6 procedure, and we believe that we will meet our threshold  
7 burden of proving a compelling interest to satisfy the  
8 religious standard.

9 And if I may, just to clarify, TDCJ did not  
10 specifically approve Christian and Muslim chaplains to be in  
11 the chamber. They approved TDCJ employees to be in the chamber  
12 who were hired as chaplains. The chaplains are not hired to  
13 specifically cater to one religion or another. And so I just  
14 wanted to clarify that characterization, although that is how  
15 it is characterized in the plaintiff's pleadings.

16 THE COURT: But right now, no religious advisor, even  
17 a TDCJ chaplain, can be in the execution chamber?

18 MS. O'LEARY: That's right. Under the new policy, we  
19 have removed chaplain from the list of people who are allowed  
20 in the execution chamber.

21 THE COURT: Okay. All right. Those are my questions.

22 If anybody else has any concerns or observations,  
23 I will be glad to hear them, beginning with plaintiff's  
24 counsel.

25 MR. NEWBERRY: I have none, Judge Lake.

1 MS. O'LEARY: Your Honor, I think just with regard to  
2 discovery, I anticipate that there is going to be a lot of  
3 contested issues throughout discovery, because information  
4 pertaining to executions is very sensitive and it is obviously  
5 a political issue. As we saw in the recent Supreme Court case  
6 in Levin, it can implicate physical threats and things like  
7 that. And so the information related to executions is -- it's  
8 guarded.

9 THE COURT: Let me ask plaintiff's counsel. You want  
10 a list of everyone who has been in the execution chamber since  
11 December 7, 1982. That's 36 years. That does seem somewhat  
12 excessive. Can you justify that date?

13 MR. NEWBERRY: That's just the first time -- that's  
14 the date of the first execution after moratorium. I don't  
15 think -- it is our belief, Judge Lake, that that list is not  
16 going to be extremely long. Normally the people that are there  
17 in the execution chamber are the correctional institution  
18 division head, which is currently Ms. Lorie Davis, the  
19 Huntsville Unit Warden, and I believe the TDCJ chaplain, who  
20 usually, I believe -- and, of course, it is not in their  
21 current policy, but I believe usually it was the Huntsville  
22 Unit Chaplain. So I don't think this list of people is going  
23 to be particularly long, even though it does cover many  
24 executions.

25 The reason that is important to us is that the

1 affidavit from Defendant Davis that was filed in their response  
2 to our complaint said that the reason it can only be TDCJ  
3 employees that are there in the execution chamber is she has to  
4 have known them for many years. They have to have shown years  
5 of devoted service, I believe is the phraseology there in the  
6 affidavit. And so that information, along with how long they  
7 worked at TDCJ or for TDCJ at that time, is relevant, because  
8 we need to see how long these people were employed there;  
9 whether or not it is true that only people that have shown  
10 years of devoted service are in the execution chamber.

11 MS. O'LEARY: Sorry. Some of the identities of people  
12 involved in executions will be statutorily confidential.

13 THE COURT: You can enter a protective order. That's  
14 not a problem, given the quality of the lawyers. I don't doubt  
15 that you can enter a protective order. There is a proposed  
16 protective order on the Court's website which you can easily  
17 either agree to or revise in a couple days.

18 I am concerned that you are not going to initiate  
19 written discovery until 30 days. That seems like an  
20 excessive -- why can't you do it in 15 days?

21 MS. O'LEARY: To begin discovery, Your Honor?

22 THE COURT: Yes. Just send out interrogatories.

23 MS. O'LEARY: Well, our entry deadline is not until  
24 May 28, and we would like to take advantage of that elongated  
25 time. That's the whole reason that we waived service, to give

1 us more time to answer and get ourselves ready for a lawsuit.  
2 And so initiating discovery would essentially eliminate that  
3 benefit that we have earned by waiving service.

4 THE COURT: I'm going to allow written discovery to be  
5 commenced on May 17th.

6 And if you have a squabble over discovery, I  
7 expect you to work together to resolve it and, if not, file  
8 something quickly with the Court. And we will set up a  
9 hearing, probably by telephone conference, as quickly as my  
10 schedule permits.

11 MS. O'LEARY: Yes, Your Honor.

12 MR. NEWBERRY: Yes, Your Honor.

13 THE COURT: Anything else?

14 MR. NEWBERRY: Not from plaintiff.

15 MS. O'LEARY: Not from the state, Your Honor.

16 THE COURT: Thank you all. You are excused. Have a  
17 good weekend.

18 *(Court adjourned at 2:21 p.m.)*

19 \* \* \* \*

20 I certify that the foregoing is a correct transcript from  
21 the record of proceedings in the above-entitled cause.

22 Date: June 26, 2019

23 */s/ Mayra Malone*

24 -----  
25 Mayra Malone, CSR, RMR, CRR  
Official Court Reporter